State of Maryland
State Labor Relations Board

In the matter of:	
Maryland Professional Employees Employees Council, AFT, AFL-CIO, Local No. 6197,	
Complainant/Petitioner,	
v.	**SLRB Case No. 03-U-02**
	Opinion No. 2
State of Maryland, et al.,	
Respondent.	

DECISION AND ORDER

On April 7, 2003, Maryland Professional Employees Council, AFT, AFL-CIO, Local 6197(MPEC or Petitioner), filed with the State Labor Relations Board ("SLRB" or "the Board") an Unfair Labor Practice ("ULP") Petition alleging that the State of Maryland (State or Respondents), through the officers and agents of the Governor, committed an unfair labor practice by failing to define unfair labor practices as required under the State Personnel and Pensions Article, Title 3 (herein after Collective Bargaining Statute), §3-306(a). MPEC further alleged that the State failed to meet its statutory obligation to engage in collective bargain in good faith within the meaning of §§3-501(b), (c) and (d), 3-502(a), and 3-601(a) and (c) of the Collective Bargaining Statute. With respect to this latter claim, MPEC alleges that the State: (1) failed to take the necessary steps to fund and implement the terms of

the parties' duly negotiated Memorandum of Understanding (MOU); and (2) expressly repudiating the MOU.[1]/

On April 24, 2003, the Board delegated to the Office of Administrative Hearings (OAH) the authority to make proposed findings of fact, proposed conclusions of law and issue a proposed order on the alleged violations contained in the ULP Petition. The case was assigned to an administrative law judge and a hearing was held on September 10 and 26, 2003.[2]/ On December 8, 2003, Administrative Law Judge (ALJ) Mary Shock issued a "Proposed Decision."

The ALJ concluded that the Collective Bargaining Statute does not make the State's failure to define unfair labor practices an unfair labor practice. The ALJ observed that § 3-207[3]/ of the Collective Bargaining Statute providing for the authority an executive officer of the Governor, the Secretary of the Department of Budget and Management (DBM), to promulgate regulations defining unfair labor practices expressly makes the exercise of that authority discretionary.[4]/ As such, the ALJ further observed that the failure, heretofore, to exercise such authority does not violate the Collective Bargaining Statute or otherwise constitute an unfair labor practice.[5]/

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[1]/ Section 3-102 of the Collective Bargaining Statute extends the rights and obligation accorded under its provisions to "all employees of: the principal departments within the Executive [Governor] Branch of State government... ." The particular MOU in question would cover employees in Bargaining Unit G, comprising engineering, scientific and administrative professional employees.

[2]/ A hearing was also held on June 24, 2003, on the Respondents' Motions to consolidate and to stay proceedings. The ALJ granted the motion to stay based on the parties' agreement to consolidate the instant case for hearing with a related ULP case the Board also delegated to OAH in SLRB Case No. 03-U-01. Respondents also sought a stay of proceedings pending the final resolution of another case then-pending in the Circuit Court of Ann Arundel County that contained asserted similar issues. Citing *Maryland Comm'n on Human Relations v. Mass Transit*, 294 Md. 225, 449 A.2d 385 (1982), the ALJ denied Respondents' Motion to stay proceedings stating that Petitioner MPEC is not a party to the Circuit Court case and have an interest in proceeding timely in the instant case.

[3]/ Section 3-207 of the Collective Bargaining Statute provides as follows:

> The Secretary **may** adopt and enforce regulations, guidelines, and policies to carry out this title which:
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> (1) define unfair labor practices; ... .

[4]/ See, also, *Maryland State Employees Union, American Federation of State County and Municipal Employees, Council 92 v. Governor Robert L. Ehrlich, et al.*, Case No. C-2003-88915DJ (Circuit Court ruled that the authority of the Secretary under § 3-207 of the Collective Bargaining Statute is discretionary).

[5]/ The ALJ's disposition of this claim turns on whether or not the Respondent's failure to define unfair labor practices is a statutory violation under the Collective Bargaining Statute. (see n. 3) We note, however, that the Petitioner's also alleges the DBM Secretary's failure to define unfair labor practices as a unfair labor practice violation pursuant to § 3-306(a). Section 3-306(a) proscribes the commission of unfair labor practices by the State as follows: "[t]he State and its officers and agents, or representatives are

With respect to MPEC's second claim, the ALJ concluded that the MOU in dispute was not effective until ratified by the Governor. The ALJ found that MPEC failed to prove that the MOU was duly ratified by the Governor and, therefore, the Respondent's refusal to fund, implement or comply with its terms did not constitute a violation of the State's statutory obligation to engage in collective bargain in good faith.

On January 12, 2004, pursuant to Title 10, Subtitle 2 of the State Government Article, § 10-216(a)(2), MPEC filed Exceptions limited to the ALJ's proposed findings of fact, conclusions of law and decision that the Respondent did not violate its statutory obligations to engage in collective bargaining in good faith with respect to the disputed MOU. The Respondent filed an Opposition to Exceptions on February 18, 2004. Upon review of the Proposed Decision, the Petition's Exceptions and Respondent's Opposition thereto, and the record as a whole, the Board hereby adopts the proposed findings of fact, conclusions of law and decision of the ALJ with respect to both alleged unfair labor practice violations. The Petitioner's Exceptions[6]/ are identical in all significant respect to the exceptions made in the companion case to this case, *AFT Healthcare Maryland, AFT, AFL-CIO, Local 5197 v. State of Maryland, et al.*, Opinion No. 1, SLRB Case No. 03-U-01 challenging parallel findings of fact and identical conclusions of law by the ALJ. (See n. 2) For the reasons articulated in our Opinion in the Decision and Order in that case, the Board finds no merit to Petition's Exceptions. Therefore, the instant Exceptions are similarly and hereby denied.

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prohibited from engaging in any unfair labor practice, as defined by the Secretary." If, *ab initio*, the Petitioner acknowledged that the Secretary had yet to define unfair labor practices, Petitioner's claim that the DBM Secretary engaged in such prohibited conduct fails to state a viable cause of action.

[6] / MPEC asserts that the ALJ's conclusion that the Governor did not ratify the disputed MOU in accordance with § 3-601(c) misconstrues the facts as applied to the requirements under the Collective Bargaining Statute. In support of its assertion, MPEC argues that: (1) under common law principles of agency and ratification, a valid ratification by a principal, e.g., Governor, can occur without knowledge of all the material facts about the matter to be ratified, e.g., MOU; (2) the ALJ's conclusion that "Governor Glendening did not have 'full knowledge of the terms of the agreements'" ignores uncontested facts in the record to the contrary; and (3) the ALJ's interpretation of "objective" evidence of ratification effectively imposes criteria not required under the Collective Bargaining Statute that: (a) ratification be in writing and (b) the MOU be signed again after the MOU is ratified by employees in the covered bargaining unit. (Except. at 3 and 5.)

ORDER

IT IS HEREBY ORDERED THAT:

The Petitioner's Exceptions are denied; the Unfair Labor Practice Petition is dismissed.

BY ORDER OF THE STATE LABOR RELATIONS BOARD
Annapolis, MD

March 26, 2004

Appeal Rights

Any party aggrieved by this action of the Board may seek review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222 and MD R CIR CT Rule 7-201 et seq.

Siegel, Member (Concurring)
SLRB Case No. 03-U-02
Opinion No. 2

In light of all the circumstances, I generally concur with the ALJ's recommended disposition and the Board's Opinion and Order on Petitioner's Exceptions. However, it is also my belief that this decision does not offer the parties guidance for their future conduct.

Curiously, the ALJ in reaching her proposed decision, felt it necessary to rely, at least in part, on the venerable decision in *Marbury v. Madison,*[7]/ a case familiar to first year law students, that was decided in 1803, two hundred years ago. This reliance is emblematic proof that the current default process is neither contemporary nor practical.

The fault probably lies with the Collective Bargaining Statute itself, in that it fails to include provisions addressing the fundamental matter of *defining* the term "unfair labor practice." This is not unlike the failure of a basic medical school text to address the matter of human anatomy. In a word, there simply is no guidance available to the parties that can be used by them to measure the legality *vel non* or propriety of their conduct. Any scheme of law enforcement that does not inform the parties of what is expected of them is necessarily inadequate.

The parties should not be required to operate at their own peril, without any prior ability to judge the propriety of their conduct. In criminal law, there can be no finding of guilt if the statute allegedly being violated offers no clear definition of what is "legal" and what is not "legal." Many such statutes, and convictions under them, have been voided because of such "vagueness."

Therefore, but solely as an interim matter, it is my view that the Board should now proceed, without further delay, to promulgate all the required and essential regulations necessary to implement and give vitality to the Collective Bargaining Statute and the SLRB process. A key failing of the current state of affairs is, as I have observed, the total absence of even a basic definition of

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[7]/ *Marbury v. Madison,* 5 U.S. 137, 2 L.Ed. 60 (1803).

what conduct constitutes an "unfair labor practice".

Fortunately, we are not without some reliable and time-tested guidelines. The National Labor Relations Board (NLRB) has dealt with similar issues for generations. Through a laborious and well-considered process, the NLRB has defined and refined the definition of "unfair labor practices" since the adoption of the Taft-Hartley Act in 1947,[8]/ and even prior to that time, under the Wagner Act adopted in 1934.

The NLRB has issued thousands of published cases interpreting the meaning of Section 8, the unfair labor practice provisions of the current Taft-Hartley Act, and continues to refine that definition virtually on a day-to-day basis.

Accordingly, while I would uphold and adopt, as a decision of the Board, the proposed decision of ALJ Mary Shook in this case, it is my view that our fellow Board Member, the Secretary of DBM, should immediately adopt by reference, but purely as an interim measure, the definitions of "unfair labor practices" as interpreted and applied by the NLRB under Section 8 of the National Labor Relations Act, insofar as they are compatible with the purposes and objectives of our statute. The matter of suitability can be considered by the Board on a case-by-case basis until final regulations are adopted.

Such an approach will obviate the difficulty made manifest by the instant cases. The parties cannot know what is expected of them, and what conduct is legally acceptable, unless they are first afforded reliable and well-reasoned guidance. An interim adoption of the NLRB standards in future SLRB unfair labor practice cases will afford such guidance, and serve to minimize future controversies, at least until final regulations are adopted by the Secretary.

The State Higher Education Labor Relations Board (SHELRB) has been confronted with a nearly identical problem. See, In the matter of the *American Federation of State, County and Municipal Employees and Donald R. Pryor v. Salisbury University, Slip Op. No. 7, SHELRB ULP Case No. 2001-03 and 2002-01.* In that case the SHELRB held that

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[8]/ "Labor Management Relations Act. 1947."

it had the statutory authority, wholly aside from any reference to administrative regulations defining unfair labor practices to act upon unfair labor practices encompassed by the Collective Bargaining Statute and lawfully adjudicate them. *Collective Bargaining Statute, §3-2A-05(b)(2)*. Thus, there is no question but that the SLRB has the statutory authority, even in the absence of administrative regulations, to adjudicate the instant cases, and we have properly done so.

Nevertheless, it would be useful to the parties to any future proceedings under our Statute to have a more definitive set of guideline, even on an interim basis. Accordingly, I urge the Secretary to authorize the recommended interim regimen, and take prompt steps to develop and promulgate specific definitions of "unfair labor practices" so that potential parties can have reliable guidance.